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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **VAENE SIVONGXXAY,** Defendant and Appellant.	**CAPITAL CASE** Case No. S078895

Fresno County Superior Court Case No. F97590200-2

RESPONDENT'S SUPPLEMENTAL LETTER BRIEF

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March 5, 2015

Frank A. McGuire
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Re: ***People v. Sivongxxay***
Respondent's Supplemental Letter Brief
California Supreme Court Case No. S078895

Dear Mr. McGuire:

On January 14, 2015, this Court directed the parties to file supplemental letter briefs addressing the following question: "If the trial court fails to obtain a capital defendant's separate waiver of his right to a jury determination of the special circumstance allegation, does that failure compel automatic reversal of the special circumstance finding? (See *Ring v. Arizona* (2002) 536 U.S. 584; *Neder v. United States* (1999) 527 U.S. 1; *People v. Sandoval* (2007) 41 Cal.4th 825.)" Automatic reversal is not required where the trial court obtains a waiver from a capital defendant of his right to a jury on the question of guilt but fails to obtain a separate waiver of that defendant's right to a jury determination of the special circumstance allegation. Rather, any prejudice is evaluated under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO OBTAIN FROM THE DEFENDANT A SEPARATE WAIVER OF HIS RIGHT TO A JURY DETERMINATION OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS IS SUBJECT TO HARMLESS ERROR REVIEW, AND DOES NOT COMPEL AUTOMATIC REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING

When the trial court fails to obtain a capital defendant's separate waiver of his right to a jury determination of the special circumstance allegations, the error is in effect the same as any other failure to submit an aggravating factor or element to the jury. Prejudice resulting from such an error should be analyzed under the harmless-beyond-a-reasonable-doubt standard articulated in *Chapman.* (*Chapman, supra*, 386 U.S. at p. 24.)

In *Apprendi v. New Jersey*, the United States Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) In *Blakely v. Washington*, the high court clarified that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington* (2004) 542 U.S. 296, 303-304 (*Blakely*), emphasis in original; accord, *Washington v. Recuenco* (2006) 548 U.S. 212, 216 (*Recuenco*).)

In *Ring v. Arizona* (2002) 536 U.S. 584, 588-589 (*Ring*), the United States Supreme Court held that Arizona's sentencing scheme was unconstitutional because it allowed a trial judge to determine the presence or absence of aggravating factors required for imposition of the death penalty. The *Ring* court reasoned, "Because Arizona's

enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi,* 530 U.S. at p. 494, n. 19, the Sixth Amendment requires that they be found by a jury." (*Id.* at p. 609.) The *Ring* court rejected the assertion that capital defendants be treated differently in this regard: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Id.* at pp. 589, 605-608.)

Under California's death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances have been found true beyond a reasonable doubt, death is the prescribed statutory maximum penalty for the offense, and the only alternative is life imprisonment without the possibility of parole. (Cal. Pen. Code, §§ 190, subd. (a); 190.2, subd. (a); *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.)

In People v. *Memro* (1985) 38 Cal.3d 658,[1] 701-702, this Court held that a separate personal waiver of the right to a jury trial on special circumstance allegations was required under then California Penal Code section 190.4, subdivision (a), which provided in part, "[I]f the defendant was convicted by the court sitting without a jury, the trier of fact [on the special circumstance allegation(s)] shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court." However, because the judgment in *Memro* was reversed on other grounds, this Court had no occasion to decide the standard of prejudice for the error. (*Id.* at pp. 704-705.)

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[1] *Memro* was overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.

Courts have applied harmless error analysis to a wide range of errors and have recognized that most constitutional errors can be harmless. (See, e.g., *Arizona v. Fulminate* (1991) 499 U.S. 279, 306-307 [listing examples].) Such cases involve "error which occurred during presentation of evidence to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) Applying harmless error doctrine to constitutional violations

> is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." [Citation.]

(*Id.* at p. 308.)

By contrast, errors that have been deemed structural and thus not amenable to harmless error analysis include the total deprivation of the right to counsel at trial, the presence of a biased judge, unlawful exclusion of members of a defendant's race from a grand jury, the right of self-representation at trial, and the right to a public trial. (*Arizona v. Fulminate, supra,* 499 U.S. at pp. 309-310.)

> Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." [Citation.]

(*Id.* at p. 310.)

In *Recuenco*, the Supreme Court of Washington determined that, under *Apprendi* and *Blakely*, the failure to submit a sentencing factor to the jury was structural error requiring reversal. (*Recuenco, supra,* 548 U.S. at p. 216.) The United States Supreme Court reversed, holding that failure to submit a sentencing factor to the jury was subject to harmless error analysis, analogizing it to the failure to submit an element of an offense to a jury. (*Id.* at p. 222.) The *Recuenco* court rejected the assertion that harmless error analysis would hypothesize a guilty verdict that was never in fact rendered:

> [I]n order to find for respondent, we would have to conclude that harmless-error analysis would apply if Washington had a crime labeled "assault in the second degree while armed with a firearm," and the trial court erroneously instructed the jury that it was not required to find a deadly weapon or a firearm to convict, while harmless error does not apply in the present case. This result defies logic.

(*Id.* at pp. 221-222.)

In *Neder v. United States* (1999) 527 U.S. 1, 4, the United States Supreme Court held that failure to submit an element of the offense to a jury was subject to harmless error analysis under *Chapman.* The Supreme Court reasoned that the error did not render the trial fundamentally unfair in the same way that complete deprivation of counsel or trial before a biased judge would. (*Id.* at p. 9.) Nevertheless, the Supreme Court reaffirmed that it would not allow directed verdicts in criminal cases. (*Id.* at p. 17, n. 2.)

The Supreme Court determined that the proper inquiry on harmless error review was whether it is beyond a reasonable doubt a rational jury would have found the defendant guilty absent the error:

> To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." [Citation.]

(*Id.* at p. 18.)

In *People v. Sandoval, supra*, 41 Cal.4th at page 825, this Court addressed the application of *Apprendi* to California's Determinate Sentencing Law, and noted that there was no distinction between a sentencing factor and an element of the crime for purposes of harmless error analysis. (*Id.* at p. 838.) This Court held that the erroneous failure to present aggravating factors to a jury would be harmless error so long as a reviewing court could conclude beyond a reasonable doubt that at least one aggravating circumstance would have been found true by a jury. (*Id.* at pp. 838-839.)

In *People v. Mil* (2012) 53 Cal.4th 400, 409, the jury was not instructed on two elements of a felony-murder special circumstance allegation. This Court held that any prejudice from the omission of two elements of the offense was amenable to harmless error review under *Chapman*. (*Id.* at pp. 409-411.) This Court distinguished the circumstance of a defective reasonable doubt instruction: "[A]n instruction that omitted some—but not all—of the elements of an offense or special circumstance allegation would prevent a jury finding on the affected elements but would not necessarily vitiate all the jury's findings." (*Id.* at p. 411.) This Court noted that, in evaluating an omission of an element, or even two, the inquiry focused on the nature of the issues removed from the jury's consideration. (*Id.* at p. 413-414.)

Similarly, in *People v. Prieto* (2003) 30 Cal.4th 226, 256-257, the trial court provided an erroneous instruction regarding a special circumstance. This Court observed that, as with the omission of an element of a substantive crime, the omission of an element of a special circumstance was subject to harmless error analysis under *Chapman*. (*Ibid.*; see, e.g. *People v. Osband* (1996) 13 Cal.4th 622, 680-682 [felony-murder special circumstance instruction that omitted intent to kill element subject to harmless error analysis under *Chapman*.].)

In *People v. Marshall* (1996) 13 Cal.4th 799, 850, the trial court determined that it was not required to obtain a separate jury finding on the multiple murder special circumstance. This Court held that the defendant had a right to a jury determination of that special circumstance, and noted that the error implicated the defendant's right to due process. (*Id.* at pp. 850-851.) Nevertheless, this Court rejected the assertion that the error was structural, and found that the trial court's failure to instruct the jury on a multiple-murder special circumstance and obtain a specific finding was harmless under *Chapman*.[2] (*Id.* at pp. 851-853.)

Here, any error in failing to obtain a separate waiver of jury trial on the special circumstance allegation did not render appellant's trial fundamentally unfair. Appellant had counsel and was tried before an impartial adjudicator. (*Mil, supra,* 53 Cal.4th at p. 410.) Verdicts were still properly given on appellant's guilt or innocence of the

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[2] However, in her concurring and dissenting opinion, Justice Kennard argued that the defendant's right to jury trial had been violated and that the error should be deemed structural. (*People v. Marshall, supra,* 13 Cal.4th at pp. 874-880 (conc. and dis. opn. of Kennard, J.))

charged offenses, and on whether the balance of aggravating versus mitigating circumstances warranted the death penalty. The alleged error was not the same as withdrawing all elements of the offense from the jury or so vitiating the jury's findings as to effectively deny the defendant a jury trial altogether. Rather, it was no different than failing to submit an element of a crime or other special circumstance to the jury, and such error is amenable to harmless error review under *Neder* and *Recuenco*. (*Mil, supra*, 53 Cal.4th at pp. 409-414.) This reasoning is consonant with that of this Court in *Sandoval* regarding the failure to submit aggravating circumstances to the jury (*Sandoval, supra,* 41 Cal.4th at pp. 838-839.)

Holding such error to be structural, where a jury trial waiver was otherwise properly taken would cause the very kinds of problems that the *Neder* court cited: abuse of the judicial process and public ridicule of it. (*Neder, supra,* 527 U.S. at p. 18.) Accordingly, any error in failing to take a separate jury trial waiver of the special circumstance allegation was not structural.

Furthermore, in this particular case, any error in this regard was harmless. Because appellant was found guilty of the robbery and murder of Henry Song, the factual predicate of the robbery special circumstance was necessarily found true, and any error with regard to taking a separate waiver of the right to a jury trial on the special circumstance was harmless under *Chapman*. (3 CT[3] 760; 4 CT 919-923; but see *People v. Marshall, supra,* 13 Cal.4th at p. 852 [special circumstance allegations other than multiple murder may not be encompassed by other jury findings and thus not necessarily harmless beyond a reasonable doubt].) Accordingly, the judgment should be affirmed.

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[3] "CT" refers to the Clerk's Transcript on Appeal.

CONCLUSION

For the foregoing reasons, and for the reasons stated in respondent's brief, any failure to take a separate waiver of a capital defendant's right to a jury determination of the special circumstance allegation is evaluated for harmless error under *Chapman*, and does not compel automatic reversal of the special circumstance finding. Any such error was harmless in the present case, and the judgment should be affirmed.

Sincerely,

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For KAMALA D. HARRIS
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LAM/dpy

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Sivongxxay*
Case No.: **S078895**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 5, 2015, I served the attached **Respondent's Supplemental Letter Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 5, 2015, at Fresno, California.

Debbie Pereira-Young
Declarant

/s/ Debbie Pereira-Young
Signature

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